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## West Virginia

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## WEST VIRGINIA



*Andrew Graham\**

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### *I. Introduction*

This Article summarizes and discusses important developments in West Virginia oil and gas law between August 1, 2019, and July 31, 2020. This Article is divided into two parts. The first part will discuss common law developments in both state and federal courts. The second part will discuss developments in legislation and regulation.

### *II. Judicial Developments*

First, this section will discuss two oil and gas cases decided by West Virginia's highest court. Next, it will discuss two cases decided by West Virginia's federal district courts. The cases are presented in chronological order as the decisions were handed down by the courts.

#### *A. The West Virginia Supreme Court of Appeals*

##### *Northeast Natural Energy LLC v. Pachira Energy LLC*

In June 2020, the West Virginia Supreme Court of Appeals held that a preliminary injunction was the appropriate remedy when one partner company misused partnership property for its own benefit.<sup>1</sup> The court found that the other partner, the plaintiff, demonstrated a likelihood of success in its claims and that it was likely to suffer irreparable harm without a preliminary injunction.<sup>2</sup>

Pachira Energy LLC ("Pachira") and Northeast Natural Energy LLC ("Northeast") agreed to establish an area of mutual interest ("AMI") in northern West Virginia and southwestern Pennsylvania to develop oil and gas leases.<sup>3</sup> The companies further agreed in a joint operating agreement that jointly-held leases would be developed and operated by splitting the costs and profits with Northeast having a 75% interest and Pachira having a 25% interest.<sup>4</sup> Later on the companies orally agreed to develop and operate a water system to serve well development in the AMI.<sup>5</sup>

In 2018, however, Northeast constructed a separate water line from the Monongahela River at its own expense to serve the AMI.<sup>6</sup> Northeast

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1. *Ne.Nat. Energy LLC v. Pachira Energy LLC*, No. 18-1034, 2020 WL 3406592, at \*4 (W. Va. June 12, 2020). *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 844 S.E.2d 133 (W. Va. 2020)

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at \*2.

6. *Id.*

charged Pachira for the branch line that connected the Monongahela River line to the original AMI water line.<sup>7</sup> Pachira then learned that Northeast had planned to utilize the AMI water system to service wells in Pennsylvania that were outside the AMI as well as plan to sell water to third parties.<sup>8</sup>

The Circuit Court of Monongalia County granted Pachira's emergency motion for a preliminary injunction and held that Pachira was "likely to suffer immediate and irreparable harm before the court would be able to issue a final ruling on Pachira's request for a permanent injunction."<sup>9</sup>

On appeal, the West Virginia Supreme Court of Appeals rejected Northeast's position that the parties were tenants in common and, instead, applied the West Virginia Uniform Partnership Act to the arrangement between Pachira and Northeast and determined that the companies were partners because both had invested time, money, labor, and resources into the AMI project.<sup>10</sup> Therefore, the AMI represented partnership property and when partners have partnership property, "the individual partners no longer have a direct interest in it."<sup>11</sup> As a result, Pachira showed it was likely to be successful on its claims because Northeast was not a tenant in common.<sup>12</sup>

The court also held that Pachira was likely to suffer irreparable harm because Northeast was using partnership property for its own purposes, which breached Northeast's fiduciary duty to the partnership.<sup>13</sup> Furthermore, while money damages may be appropriate for a breach that has already happened, an injunction would prevent future breaches.<sup>14</sup> The court affirmed the grant of the preliminary.<sup>15</sup>

*\*Note: The author's firm represented Northeast Natural Energy LLC in the case.*

*EQT Production Company v. Taschler*

The West Virginia Supreme Court of Appeals held that an oil and gas lessee could not revive a 1905 lease agreement by entering into a ratified

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7. *Id.*

8. *Id.*

9. *Id.* at \*3.

10. *Id.* at \*5 (citing *Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785, 800 (W. Va. 2014) (quoting Donn, RevisedUnif. P'ship Act, § 204)).

11. *Ne. Nat. Energy*, 2020 WL 3406592, at \*5.

12. *Id.* at \*4.

13. *Id.* at \*8.

14. *Id.* at \*6.

15. *Id.* at \*8.

lease agreement because a 1985 default judgment order estopped the lessee by the doctrine of laches.<sup>16</sup>

The surface property owner, Taschler, filed suit for a declaratory judgment against EQT Production Company (“EQT”), to clarify his rights under a 1905 lease agreement (the “Hall Lease”), and to prevent EQT from erecting oil and gas wells on his property.<sup>17</sup> Taschler’s predecessor in title, Heyward Hall, had previously filed a civil action in 1985 to challenge the Hall Lease.<sup>18</sup> In that 1985 civil action, the court held that the Hall Lease was “forfeited . . . of no force or effect” and that it gave no mineral rights to EQT.<sup>19</sup> In 2015, EQT entered into a ratified lease agreement with an heir of the original lessor to the Hall Lease.<sup>20</sup> EQT notified Taschler of its intent to construct wells on his property, but when EQT later entered onto Taschler’s property, it did not drill.<sup>21</sup>

The Circuit Court of Ritchie County granted summary judgment for Taschler and ruled that the doctrine of laches estopped EQT, and that the terms of the Hall Lease prevented EQT from drilling on Taschler’s property.<sup>22</sup> On appeal, the West Virginia Supreme Court of Appeals held that (1) the 2015 ratified lease agreement did not revive anything because it “paid no deference” to the 1985 default judgment, and (2) the 1985 default judgment was binding because of the doctrine of laches and the fact that 36 years had passed since the court’s order.<sup>23</sup> As a result, the court affirmed the circuit court’s grant of summary judgment for Taschler.<sup>24</sup>

#### *B. Federal Courts*

##### *Cather v. EQT Production Company*

The United States District Court for the Northern District of West Virginia reaffirmed that, under West Virginia law, oil and gas lessees may

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16. *EQT Prod. Co. v. Taschler*, No. 19-0370, 2020 WL 3407766, at \*3 (W. Va. June 18, 2020).

17. *Id.* at \*1–2.

18. *Id.* at \*1.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at \*2.

23. *Id.* at \*3.

24. *Id.*

not deduct post-production expenses when calculating a lessor's royalty payment unless the lease has clear language that permits such deductions.<sup>25</sup>

In 1963, Equitable Gas Company ("Equitable") entered into a lease agreement (the "Cather Lease") with the plaintiffs.<sup>26</sup> The Cather Lease was silent on whether a lessee could deduct post-production costs when calculating the lessors' royalty payment.<sup>27</sup> EQT is the successor in interest to Equitable under the Cather Lease.<sup>28</sup> In 2012, EQT constructed six wells to develop the Marcellus Shale formation.<sup>29</sup> EQT also sent monthly Remittance Statements to the plaintiffs that included information like production date, owner volume, and gross and owner deductions.<sup>30</sup>

The plaintiffs moved for summary judgment specifically on post-production expenses and severance tax deductions.<sup>31</sup> EQT argued that it allocated expenses proportionately rather than deducted from royalty payments.<sup>32</sup> It also asserted that lessors are also responsible for expenses under the Severance and Business Privilege Tax Act of 1993, W. Va. Code § 11-13-A-3a(c), which applies to "all persons severing gas or oil in this state."<sup>33</sup>

The court held that, under West Virginia law, oil and gas leases that are silent on the deduction of post-production expenses do not allow a lessee to deduct post-production expenses when calculating a lessor's royalty payment and that, in the face of a silent lease, the "lessee must bear all costs incurred."<sup>34</sup> The court further reiterated that royalty payments could not be reduced by post-production expenses unless the lease has "express" language that "identif[ies] with particularity" the deductions to be taken.<sup>35</sup> In addition, a few years prior to this case, the court granted a directed verdict to royalty owners where the lease was silent on severance tax

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25. *Cather v. EQT Prod. Co.*, No. 1:17-CV-208, 2019 WL 3806629, at \*4 (N.D.W. Va. Aug. 13, 2019).

26. *Id.* at \*1.

27. *Id.*

28. *Id.*

29. *Id.* at \*2.

30. *Id.*

31. *Id.* at \*3.

32. *Id.* at \*1.

33. *Id.* at \*5.

34. *Id.* at \*3 (citing *Wellman v. Energy Res., Inc.*, 557 S.E.2d 254, 265 (W. Va. 2001)).

35. *Cather*, 2019 WL 3806629, at \*3 (citing *Estate of Tawney v. Columbia Nat. Res., L.L.C.*, 633 S.E.2d 22, Syl. Pt. 10 (W. Va. 2006)).

deductions.<sup>36</sup> As a result, the court granted the plaintiff's motion for summary judgment for post-production expenses<sup>37</sup>, the severance tax deductions<sup>38</sup>, and the court also granted prejudgment interest because there was no dispute to the amount of total deductions from royalty payments.<sup>39</sup>

*Richards v. EQT Production Company*

In August 2019, the United States District Court for the Northern District of West Virginia held that a jury could find that the lease phrase "market price" did not mean deducting post-production expenses from royalty payments and doing so was a breach of the lease contract.<sup>40</sup> The court also held that severance tax is applicable only to those that extract natural gas from the land where leases are silent on deducting severance tax from royalty payments, and that awarding prejudgment interest was appropriate to remedy a delay in recovering compensation.<sup>41</sup>

After amending six leases in 2014 with the Richardses, EQT Production Company commenced horizontal drilling for the development of Marcellus Shale natural gas.<sup>42</sup> The amendments did not change the royalty provision in the lease, which remained the same as it was in 1954, when the leases were first granted.<sup>43</sup> The royalty provision provided that the lessor was entitled to "one-eighth (1/8) of the market price of the gas from each and every gas well drilled . . ."<sup>44</sup> EQT's Chief Accounting Officer testified that the item "owner deducts" on a monthly remittance statement meant that, when it calculated the market price, EQT took the TETCO M2 index price, and subtracted post-production expenses, then determined royalty payments.<sup>45</sup> The Chief Accounting Officer further testified that severance tax was also deducted from royalty payments.<sup>46</sup> Also, EQT did not deduct post-production expenses from vertical wells but did take deductions for

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36. *Cather*, 2019 WL 3806629, at \*5-6 (citing *Richards v. EQT Prod. Co.*, No. 1:17CV50, 2018 WL 3321441, at \*4 (N.D.W. Va. July 5, 2018)).

37. *Cather*, 2019 WL 3806629, at \*5.

38. *Id.* at \*6.

39. *Id.* at \*8.

40. *Richards v. EQT Prod. Co.*, No. 1:17CV50, 2019 WL 4120819, at \*5 (N.D.W. Va. Aug. 29, 2019).

41. *Id.* at \*6-7.

42. *Id.* at \*4.

43. *Id.* at \*2.

44. *Id.* at \*4.

45. *Id.*

46. *Id.*

severance taxes.<sup>47</sup> The Richardses filed suit against EQT for improperly deducting post-production expenses from their royalty payments as well as the deduction of severance taxes from their royalty payments.<sup>48</sup>

After a jury trial, where the court granted the plaintiff's motion for a directed verdict on the issue of severance tax and the jury returned a verdict in favor of the plaintiffs on a breach of contract claim<sup>49</sup>, EQT moved for (1) judgment as a matter of law on the breach of contract claim, and (2) the court to alter or amend judgment on the issue of severance tax and for a new trial.<sup>50</sup> Meanwhile, the plaintiffs moved for prejudgment interest on the issue of severance taxes.<sup>51</sup>

The court found, when viewed in the light most favorable to the Richardses, because of the plain language found in the lease, a jury could find that EQT's calculation did not reflect the market price and thus breached the terms of the lease.<sup>52</sup> Further, even though the West Virginia Supreme Court of Appeals had yet to decide whether severance tax may be deducted from royalty payments, the court held that absent any language in the lease to the contrary, the Severance and Business Privilege Tax Act of 1993, W. Va. Code § 11-13A-3a, applied only to those extracting natural gas and not the Richardses.<sup>53</sup> Lastly, the court awarded prejudgment interest to the Richardses on the issue of severance taxes because the court has discretion to award prejudgment interest on a grant of a directed verdict.<sup>54</sup> The court found that "equities weigh in favor of awarding prejudgment interest to the Richardses for the delay in recovering damages."<sup>55</sup>

\* Note: The author's firm represented EQT Production Company in the case.

*Parsons v. Columbia Gas Transmission, LLC*

In April 2020, the United States District Court for the Southern District of West Virginia held that the claims of trespass, conversion, and unjust

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47. *Id.*

48. *Id.* at \*1.

49. *Id.*

50. *Id.* at \*3.

51. *Id.* at \*6.

52. *Id.* at \*4-5.

53. *Id.* at \*5-6.

54. *Id.* at \*7 (citing *see, e.g., Velasquez v. Roohollahi*, No. 13-1245, 2014 WL 5546140, at \*3 (W. Va. Nov. 3, 2014)).

55. *Richards*, 2019 WL 4120819, at \*7.



enrichment were not time-barred<sup>56</sup> and that the Natural Gas Act (“NGA”) did not preempt such state law claims.<sup>57</sup>

Columbia Gas Transmission Corporation (“CGT”) owns and operates an underground storage field, the Ripley Storage Field, which is located beneath the plaintiffs’ property and the plaintiffs owned the mineral rights.<sup>58</sup> Depending on demand, CGT would store gas in the Ripley Storage Field and extract it when demand was high.<sup>59</sup> In doing so, CGT would also remove native gas.<sup>60</sup> In addition, CGT kept records, unavailable to the public, of whose property was encompassed in the Ripley Storage Field but later notified some plaintiffs of the overlap of their property and its storage field.<sup>61</sup>

On a partial motion to dismiss, CGT argued that the plaintiffs’ claims for trespass, conversion, and unjust enrichment were time-barred because claims for trespass and conversion had to be brought within two years and a claim for unjust enrichment had to be brought within five years, and the latest possible time the plaintiffs knew of Ripley Storage Field was the 1970s.<sup>62</sup> Because the complaint was not clear on its face whether the plaintiffs owned their property in 1971, the court denied the motion to dismiss for trespass, conversion, and unjust enrichment.<sup>63</sup>

CGT also argued that the claims for trespass, conversion, and unjust enrichment failed because of field preemption and conflict preemption.<sup>64</sup> As to whether the NGA preempted state law, the court noted that a company must first acquire a FERC certificate, show a need for an easement, and have been unable to acquire the easement by agreement.<sup>65</sup> Even though CGT had a FERC certificate, because the court could find neither Congressional intent nor statutory language in the NGA that would suggest a state law claim would be barred against a company’s unauthorized use of a landowner’s property, the court denied the partial motion to dismiss.<sup>66</sup> The court also held that conflict preemption was not applicable because

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56. *Parsons v. Columbia Gas Transmission, LLC*, No. 2:19-cv-00649, 2020 WL 2044626, at \*4 (S.D.W. Va. Apr. 28, 2020).

57. *Id.* \*7.

58. *Id.* at \*2.

59. *Id.* at \*1.

60. *Id.*

61. *Id.* at \*2.

62. *Id.* at \*3-4.

63. *Id.* at \*4.

64. *Id.* at \*5.

65. *Id.* (citing 15 U.S.C. § 717f(h)).

66. *Parsons*, 2020 WL 2044626, at \*6.

CGT did not argue that following both state and federal law was a “physical impossibility” (which is required for conflict preemption) and therefore refused to find that the NGA preempted the state law claims.<sup>67</sup>

### *III. Legislative and Regulatory Developments*

#### *A. Legislative Enactments*

##### *Senate Bill 554*

Senate Bill 554 creates a statutory system under which an oil and gas lessee can be required to provide a release to the lessor 60 days after the oil and gas lease has been terminated, canceled or expired on its terms.<sup>68</sup> The bill passed on March 2, 2020, and took effect May 31, 2020.<sup>69</sup>

##### *Senate Bill 802*

Senate Bill 802 allows natural gas users, those who use at least 100 mcf annually, to bypass Federal Energy Regulatory Commission approval and purchase natural gas.<sup>70</sup> This bill passed on March 7, 2020, and took effect June 5, 2020.<sup>71</sup>

##### *House Bill 4019*

House Bill 4019 established the Downstream Natural Gas Manufacturing Investment Tax Credit Act of 2020.<sup>72</sup> This encourages investment in downstream natural gas manufacturing by giving a state tax credit to eligible taxpayers upon investment in new or expanded downstream natural gas manufacturing facilities in the state. This bill passed on March 5, 2020, and took effect June 3, 2020.<sup>73</sup>

##### *House Bill 4088*

Under House Bill 4088, if payments from unknown and unlocatable owners go unclaimed for seven years, the payments will be redirected into the Oil and Gas Reclamation Fund for the purpose of plugging orphaned

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67. *Id.* (citing *Smith v. BAC Home Loans Servicing, LP*, 769 F. Supp. 2d 1033, 1039 (S.D.W. Va. 2011) (citations omitted)).

68. *See* 2020 W. Va. Laws Ch. 140 (S.B. No. 554)..

69. *Id.*

70. *See* 2020 W. Va. Laws Ch. 305 (S.B. No. 802).

71. *Id.*

72. *See* 2020 W. Va. Laws Ch. 332 (H.B. No. 4019).

73. *Id.*

and abandoned oil and natural gas wells.<sup>74</sup> This bill passed on March 5, 2020, and took effect June 3, 2020.<sup>75</sup>

*House Bill 4090*

House Bill 4090 created the Oil and Gas Abandoned Well Plugging Fund.<sup>76</sup> It also cuts severance tax on most conventional wells, excluding horizontal wells, from 5% to 2.5% and places the 2.5% tax into the abandoned well plugging fund. This bill passed on March 3, 2020, and took effect June 1, 2020.<sup>77</sup>

*House Bill 4091*

House Bill 4091 will expedite oil and gas well permitting upon payment of applicable expedited fees. Producers can opt to pay \$20,000 for the initial well and \$10,000 for each additional well on the pad to receive a permit within 45 days of the application instead of the current procedure of \$10,000 for the initial well and \$5,000 for additional wells.<sup>78</sup> This bill passed on February 5, 2020, and took effect May 5, 2020.<sup>79</sup>

*House Bill 4421*

House Bill 4421 established the Natural Gas Liquids Economic Development Act which gives tax credits to companies that transport or store natural gas liquids. This bill passed on March 5, 2020, and took effect June 3, 2020.<sup>80</sup>

*B. Regulatory Changes*

*House Bill 4217*

House Bill 4217 authorized a rule change for the Oil and Gas Conservation Commission to modify horizontal deep well spacing regulations found in 39 CSR 1. Well operators will have to maintain a distance of 1,000 feet from other producers' productive wells and a distance

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74. See 2020 W. Va. Laws Ch. 143 (H.B. No. 4088); JacksonKelly PLLC, *supra*

75. See H.B. No. 4088.

76. See 2020 W. Va. Laws Ch. 133 (H.B. No. 4090).

77. *Id.*

78. Charles Young, *House Energy Committee advances two bills sought by WV oil and gas industry*, WVNews (Jan. 14, 2020), [https://www.wvnews.com/news/wvnews/house-energy-committee-advances-two-bills-sought-by-wv-oil-and-gas-industry/article\\_8638afad-087e-50e8-9a06-bd45df3eacae.html](https://www.wvnews.com/news/wvnews/house-energy-committee-advances-two-bills-sought-by-wv-oil-and-gas-industry/article_8638afad-087e-50e8-9a06-bd45df3eacae.html).

79. See 2020 W. Va. Laws Ch. 134 (H.B. No. 4091)..

80. See 2020 W. Va. Laws Ch. 334 (H.B. No. 4421).

of 800 feet from its own wells.<sup>81</sup> This bill passed on March 3, 2020, and took effect June 1, 2020.<sup>82</sup>

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81. National Association of Royalty Owners, *West Virginia Legislative Update* (Mar. 30, 2020), <https://www.naro-us.org/page-1863713>.

82. *See* 2020 W. Va. Laws Ch. 211 (H.B. No. 4217).